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JANUARY 3d, 1745.

P E T I T I O N

F O R

Sir ALEXANDER COCKBURN of *Langtoun*,
Baronet, apparent Heir-male of the Fa-
mily of *Langtoun*, Pursuer.

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NOTICE

By Order of the

PETITION

FOR

Sir Alexander Cockburn of London
Petitioner and Agent for the
City of London



JANUARY 3d, 1745.

Unto the Right Honourable, The Lords of Council and Session,

THE
PETITION
OF

Sir ALEXANDER COCKBURN of *Langtoun*,
Baronet, apparent Heir-male of the Fa-
mily of *Langtoun*, Pursuer,

HUMBLY SHEWETH,

THAT in the more ancient Times, before the
Reign of King *James II.* of *Scotland*, it was the
frequent Usage and Practice of the Crown, to
grant Offices, in *Fee and Heritage*, to Persons
who were at the time considerable and in Favour,
so as these Offices might be descendable to their Heirs, until
this Practice was restrained by the 44th *Act* of the 11th *Parl.*
of King *James II.* which provides, "That there be no Of-
fice in Time to come given in *Fee or Heritage*."

Of the Grants of this Sort, that were either originally made
before this Statute, or, tho' posterior to it, came to be con-
firmed by long Possession: There were a good Number, of va-
rious Degrees of Dignity and Importance; Several of which
continue to be enjoyed by the Descendents of the Grantees to
this Day; Such as the heritable Office of *High Constable* in the
Family of *Exrol*, the Office of *Heritable Master of His Ma-
jesty's Household* in the Family of *Argyle*; and such was the
Office of *Justice General* in the same Family, the Office of

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Earl Marischal in the Family of Keith, and that of High Admiral of Scotland in the Family of Lenox.

Amongst the rest it appears, that before the Reign of *James II.* the Office of *Principal Usher* to the King was granted to the Petitioner's Predecessors heritably; what was the precise Date of the original Grant does not with Certainty appear; but the oldest Record thereof now extant is a Charter by King *Robert II.* in the second Year of his Reign, which was about the Year 1372, whereby this Office is granted *Alexandro de Cockburn*, therein designed *dilecto nostro armigero*. This Charter contains also a Grant of three Baronies of *Bolton, Carin* and *Langtoun* in free Forrestry and Warren, with the Burgh of Barony of *Langtoun*; and then adds: "Itaque quod dictus Alexander hæredes vel assignati sui intersit vel intersint tres sectas capitales, viz. sectam itineris Justitiariæ tent. inter vicecomitatum de Berwick super Tuedam, sectam itineris Justitiariæ tent. apud Edinburch, & Parlamentum nostrum tent. apud Sconam: & quod dictus Alexander vel hæredes (*here the Words*, vel assignati, *are not repeated*) sint principales offiarii nostri ad nostra Parliamenta, generalia Concilia & Festa, capiendos de nobis & successoribus nostris, per dictum tempus, liberationem pro duobus armigeris, duobus acutenentibus cum gladiferis, & equis pertinentibus eisdem, reddendo inde annuatim nobis & successoribus nostris unum par calcarium deauratorum nomine *Albae* firmæ, si petatur tantum, pro omni alio servitio ex actione seu demanda quæ de dictis baroniis & tenendiis ejusdem cum pertinentibus exigi poterint vel requiri."

This *Reddendo* is plainly given for the Lands contained in the Charter, and has no Connection with the separate Grant of the Office conferred upon *Alexander* and his Heirs, for which they were to be intitled to Livery and Maintenance for their Attendance, as in the Charter mentioned.

In *September 1681*, this Charter is inserted and registred in the

the Records of Parliament by particular Order of the King's Majesty and the Estates, *having heard and considered the Petition of Sir Archibald Cockburn of Langtoun, setting forth, That this was an Office which concerned the Parliament itself, and the Charter therewith produced.*

Posterior to this Charter, there were a Variety of others from Time to Time, granting to the Petitioner's Predecessors as well the Family-Estate of *Langtoun*, as this heritable Office. One of these bears Date in the Year 1509, giving the Lands and Barony of *Langtoun* and *Carin*, and the Office of chief Usher to *Alexander Cockburn*, Son and apparent Heir of *William Cockburn* of *Langtoun*, proceeding on the Resignation of the said *William*, and containing a *Novodamus* of the Office of Usher, which is by this Charter annexed to the Barony.

In the Year 1540, the Lands and Barony of *Langtoun* and *Carin*, with the Office of principal Usher, and Fees and Casualties thereto belonging, are disposed to *Alexander Cockburn*, Son and apparent Heir to *James Cockburn* of *Langtoun*, and his Heirs and Assignies, proceeding on the Resignation of *James* the Father; and containing a *Novodamus*, and a new Erection of the said Lands and Office of Usher into a Barony.

In 1595, the Lands and Barony of *Langtoun*, and Office of principal Usher, with the Fees thereof, are disposed to *William Cockburn* of *Langtoun*, and his Heirs-male whatsoever, proceeding on the said *William's* own Resignation, and containing a *Novodamus*.

In 1609, the Lands and Barony of *Langtoun*, and Office of King's Usher, are disposed to Sir *William Cockburn* of *Langtoun*, and the Heirs male of his Body; which failing, to Sir *Archibald Cockburn* of *Clarkington*, and the Heirs-male of his Body; which failing, to said Sir *William* his Heirs-male whatsoever, proceeding upon his own Resignation, and containing a *Novodamus*.

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By three Charters of this Office, granted in the Years 1647, 1660, and 1662, it appears, that there was some Encroachment made upon *Langtoun*, by giving a temporary Right to this Office, or Part of it, to *James Maxwel* of *Innerwick*, and *William Maxwel* of *Kirkhouse*, and thereafter to *Robert Cuninghame* Brother to the Earl of *Glencairn*, it does not appear distinctly how any of these Persons came to have a Grant or Presentation to this Office, or any Part of it; but in all Appearance it was an Incroachment upon the heritable Right to this Office, which was first made during the Troubles in the latter End of King *Charles I's* Reign. But in the Year 1674, Sir *Archibald Cockburn* obtains a new Charter, and Ratification of all former Grants of this heritable Office of *Usher*; and a yearly Fee or Pension of 250 *L. Sterling* is granted to the Office, in Lieu of the *Livery, or Maintenance*, that was to be furnished by the Crown, according to the ancient Grant, for defraying the Expence and Equipage of the *Usher*, for his *Esquires, Archers, Sword-Bearers*, and his and their *Horses* and their *Grooms*: And in this Charter also the *Lands and Barony* of *Langtoun* are disposed, and of new erected into a *Barony* along with the Office of *Usher*, and the Fee thereto belonging.

Sir *Archibald Cockburn* of *Langtoun*, the Receiver of this last Charter, the Petitioner's Great-grandfather, contracted great Debts, and *Archibald Cockburn* his Son, and Sir *James Cockburn* of *Cockburn* were bound in many of these Debts jointly with him, and Sir *Archibald* having provided the Fee of his Estate to his Son, in his Contract of Marriage in the 1684, with the Reservation of his own *Liferent*, he thereafter renounced his *Liferent* of a great Part of the Estate, and of the heritable Office of *Usher*, in favour of his Son, for his Relief of the Engagements he had come under for his Father; and in the Year 1690, *Archibald Cockburn* the Son disposed the heritable Office of *Usher* to Sir *James Cockburn*, for his Relief of his Engagements for *Archibald* and his Father.

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At the same Time the other Creditors of *Langtoun*, who were Creditors of Sir *Archibald* the Father, and *Archibald* the Son, adjudged from them the Estate of *Langtoun*, and also this Office of principal Usher, and the Fees thereof.

In the Year 1692, when the Person intitled to this Office was the Debtor, who had disposed the same toward Satisfaction of his Creditor, a Competition arose between Sir *James Cockburn* the voluntary Disponee, and the other Creditors of *Langtoun*. Adjudgers, with respect to the Fees of this Office; in which the Lord Ordinary in the Ranking, preferred Sir *James Cockburn*, upon the Priority of his Right and Infeftment; and the Petitioner believes it may be true that Sir *James*, and after his Death Sir *William* his Son, have possess the Fees of the Office in consequence of this Preference, and other voluntary Transactions betwixt Sir *William Cockburn* and the Heirs-male of *Langtoun's* Family, namely Sir *Alexander Cockburn*, who, in the 1711, served himself Heir *cum beneficio inventarii* to Sir *Archibald* his Brother, in the Estate of *Langtoun*, and also in the Office of Usher, and Pension thereto belonging; but Sir *William Cockburn*, or his Father, tho' they took Right to the Profits by the Deed of their Debtor, never pretended to hold or exercise the Office itself, but the same has constantly been exercised upon all Occasions by the Heir-male of *Langtoun*.

The Creditors of *Langtoun* have in the Year 1739, brought an Action of Ranking and Sale of the Estate of *Langtoun*, under which they seek to comprehend not only the Land-Estate, but also the Office of heritable Usher, and Fees thereof; and the Petitioner, who is apparent Heir-male of the Family, being made Party to this Action, did not oppose the Sale of the Family-Estate, being resolved to give way to it, and nowise to involve himself in a Representation of his Predecessors, whose Affairs have been for some Time very intricate; but to rest satisfied with such other adventitious Estate as it has been his Fortune to be provided with; at the same Time as he conceived,

ved, and was advised, that the heritable Office granted to his Predecessors was, in its Nature, very distinct from their proper Patrimonial Estate, and that the Office was not liable to be acquired by the legal Diligence of Creditors; but, upon the Estate being evicted, might descend to him as the apparent Heir of the Family: He therefore brought his Action of Declarator before your Lordships, *That this Office is not a patrimonial Estate that was alienable by his Predecessors, or affectable by their Creditors; but that it must descend to the Heirs of the Family in the Right of Blood, and that his, the Pursuer's taking and holding this Office, cannot subject him to the Debts of his Predecessors.*

This Process came in before the Lord Arnistoun Ordinary, where Appearance being made for Sir William Cockburn and others, Creditors of Langtoun, the Debate was reported to your Lordships, upon very full Informations, upon the 14th ultimo, when the following Interlocutor was pronounced, *On Report of the Lord Arnistoun, the Lords find, That the Office in question is adjudgable, and remit to the Lord Ordinary to proceed accordingly.*

As this Interlocutor, so far as the Petitioner can learn, is the first Time that the Question has been so determined after Trial or Debate; and as there was a considerable Variety of Opinions amongst your Lordships upon this Question, which, as it stands by the Interlocutor, is a new and leading Case, that may have very great Influence in future Times, in the Case of other heritable Offices, upon possible Contingencies, the Petitioner makes this Application, in order to pray your Lordships once more to review the Merits of this Question, and to alter the Interlocutor above-recited. In order to which, as the Case was before very fully argued in the Informations, the Petitioner shall now rather choose to contract the Debate into as narrow Bounds as possible, by stating briefly the Reasons for Support of the Intention of his Action, and then endeavouring to answer the principal Objections of his Opponents, and that these

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these may not be blended together, the Petitioner shall, in the *first* Place, consider the Case, as if the Grants of this Office had been always distinct and separate from the Charters of the Land-Estate belonging to this Family; and afterwards, it may be considered, whether there is any, or what Influence on the Question, from conjoining of both together in the same Charters, or the Words uniting or annexing the Barony and Office to each other.

And taking the Matter in the former of these Views, that nothing had been granted to *Alexander Cockburn* and his Heirs by K. *Robert* the II. but the naked Office of Usher it self, with the Livery and Maintenance for the Esquires, and so forth thereto belonging, during his Attendance at Court upon solemn Occasions of Parliaments, Councils, or Festivals: It is not easy to conceive how this naked Office could be reckoned a Part of the patrimonial Estate of the Officer, and liable to be adjudged or appraised by his Creditors; for the Grant it self contains nothing more than a personal Privilege, or Trust committed by the Crown to a Family, by it chosen to render Attendance and Service in the Manner, and upon the Occasions specified in this Grant; this was, no doubt, on the Part of the Crown, conferring a Trust that was accompanied with some Honour and Dignity; and, on the Part of the Grantee, and his Heirs, or Descendents, there was a Duty and Burden undertaken; but, in the original Constitution of the Office, there is nothing lucrative or patrimonial, the only Thing peculiar in the Grant, is, That the King chooses for himself and his Successors, one Family, who shall, in all Time coming, serve the Crown in the Duties of this Office, this was a perpetual Grant, which there was no Law then prohibiting; but still the Nature of the Grant was no more than the conferring of an Office; and, as by the Nature of the Thing, no Servant, or Officer, who gets such Grant during his Life, or for a Term of Years, has Power to alienate that, or substitute another in his Place, without the Choice or Consent

sent of his Master, it must be equally absurd and impracticable for any Creditor of his, by the Force of legal Diligence, to denude the Officer, and put himself in his Place, and to force himself upon the King for a Servant or Attendant of any Kind; and if the Nature of the Thing forbid this, when the Grant of an Office is made to one Person, it does not seem to alter the Case when the Office is granted heritably, or descendable to Heirs, for this affects only the Endurance or Continuance, but does not alter the Nature or Subject of the Grant it self, it is still but an Office in the Person of the Heir, as well as of the first Grantee, implying a Trust on the Part of the Crown or Master, and a Privilege and Duty on the Part of the Officer, which is no less unalienable when it is given by way of Survivancy, or perpetual Succession, than when it is conferred upon one Man, either for Term of Years, or during his Life.

And that it is the Nature of the Subject itself that is granted, and not the Endurance thereof, or the Terms of the Grant, as being heritable or descendable to Heirs, that must determine whether it is properly patrimonial or alienable, cannot be better illustrated than by the Example which comes the nearest to such heritable Offices; and that is, the Grants from the Crown of *Titles of Honour* of any Kind *higher or lower*; and, in the *first* Place, to mention one that was granted to this very Family, and is also heritable, and that is, their Patent for being *Knights-Baronets*; this Grant or *Title*, is what has now descended to the Petitioner, and what he may surely take without any Service or Representation of his Predecessors, and tho' it was given *heritably* to the first Patentee, and his Heirs-male, this did not render the same *patrimonial*, or any more liable to be alienated voluntarily, or to be adjudged by Creditors, than if it had been the Honour of Knighthood conferred upon a single Person for his Life: It is therefore the Nature of the Grant it self, and not the Condition of 'tis being heritable or descendable, that must determine

termine whether it be patrimonial or adjudgeable ; and the Petitioner, with great Submission, conceives, That the heritable Office in Question, granted to his Ancestors, is now descendable to him in like Manner as the Title of Baronet, which was also granted to them, and may be taken without Service or Representation, the Office no more than the other, being any Part of their patrimonial Estate that could be bought or sold for Money, and liable to be distrained or affected with the Diligence of Creditors.

This Comparison, the Petitioner apprehends to be perfectly just betwixt the heritable Offices and Dignities that are conferred by the Crown, and that the Offices are to be ranked as of the same Nature with the Dignities, or Titles of Honour, as resembling these in Contradistinction to the Lands, or other patrimonial Estate that are *in commercio*, and daily liable to be bought and sold by voluntary Transactions, or to be evicted by the Diligence of Creditors ; for the *Offices*, as well as the *Dignities* of every Kind, *higher* or *lower*, continue still to be *beneficia*, conferred from the mere Favour of the Crown, upon regard to the Grantee, or those of his Blood, or Family : And as, upon the one Side, there is a Trust reposed, and a Privilege or Dignity conferred ; so, on the other Part, there are Duties and Services prestable by the Grantee, and his Descendents in the same Manner as in the Case of Dignities conferred, even the higher of *Nobility*, the Receiver and his Heirs become hereditary *Counsellors* to the Crown, and entitled, or rather obliged, to attend and give Advice in Parliament, as well as the heritable Officers are bound to discharge their respective Duties of the Offices upon them conferred ; They are of the like Nature as *Benefits conferred* by the Crown upon the Grantees, and their Families, or Descendents, for *reciprocal Service* to be performed, they are equally remote, and distinct from patrimonial Estate that can be bought and sold ; and they ought therefore to be held

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equally incapable of being adjudged, or distrained by the Diligence of Creditors.

In the Case of the higher Offices that have been granted heritably in this Kingdom, such as those of the great *Constable*, *Marischal*, *Justice General*, *Steward of the Household*, *Admiral*; the Petitioner's Opponents, in this Debate, have not adventured to maintain a Proposition, which carries such manifest Absurdity, as that these would be liable to be adjudged by Creditors; or that a Taylor, for Instance, adjudging or appraising for Payment of his Bill, could have ever been entitled to sit down upon the highest Bench of the Kingdom, or to put himself at the Head of the Army, or of the King's Household; and if this be confessedly too absurd to be maintained, it has been very justly observed, That it can make no substantial Reason of Difference in the present Case, that the heritable Office in Question of *principal Usber*, is much inferior in Dignity and Importance to those high Offices, and that it is easier to find Persons who may be qualified to perform the Duty of it; for the Nature of all the heritable Offices is still the same, tho' the Kinds or the Species differ, even as in the Case of Dignities; That of a *Lord*, *Baron*, or even of a *Baronet*, is as little patrimonial or liable to be adjudged, as that of the first *Duke*, and Peer of the Realm; and in like Manner, it is no less incongruous and absurd, that a Creditor Adjudger should come and walk before the King as his *principal Usber*, than he could take the Direction of his Household, or his Armies, or sit down in his highest Court of Justice.

The Petitioner is apprehensive, that it is the King's constant Residence in *England* since the Union of the Crowns, which has only given Occasion for the Creditors, in this Case, to contest the present Question; and that it would never have come into the Head of any Man, if the King was still resident in *Scotland*, to imagine, that it was in the Power of a Creditor, one or more, by Adjudication, to force himself into an Office.

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Office of Trust about the King's Person, whether he would or not; or to conceive it possible to be consistent with Law, or with common Sense and Decency, that one Day *Langtoun* the King's known and trusty Servant, as his principal Usher, the next Day appears an Adjudger in his Place, claiming to walk before the King, to whom he was unknown, and possibly such a Person, as would be very unfit to be trusted, or even reflecting an Indignity on the Office; or, as the Law was afterwards modelled, twenty Adjudgers might come at once, claiming to walk before the King *pari passu*: It is however certain, that in point of Law, it can make no Difference, whether the King reside, and the Parliament be held in *Scotland* or not; and that the accidental Variation of these Circumstances can make no Difference in the Nature of the Office itself, or the Principles of Law, by which the Effect of that is to be governed.

There are many Offices, Civil and Ecclesiastical, that are held by the Officers for Life, and these are justly held and esteemed to be Freeholds of their own Kind; and yet no Body ever imagined, that these could be adjudged, tho' a patrimonial Estate for Life may be adjudged; and the Reason of the Difference is founded in the Nature of the Subject; The Officer is chosen for personal Considerations, and enjoys the Advantages of the Office, in consideration of the Duty to be performed; and as the Granter cannot be obliged to accept of the Duty of that Office from a Stranger, it is inconsistent with the Nature of the thing, that the Office itself should be adjudgeable; And the Choice of a certain Family, or a Person and his Descendents, to hold successively an Office in all Time coming, as it was a thing accustomed, truly proceeded on the like Considerations, with the Choice of a single Person, of Regard or Affection to the Race, and the Hope or Presumption of Fidelity in the Descendents of these, whose Duty had been already experienced, and could never be meant to expose the Crown, or the Publick, to the Hazard of having an Office of Trust about

about the Person of the King supplied by any Creature, however worthless or unfit, who might, in After-times, chance to be Creditor to the Officer for the Time being.

For these Reasons, the Petitioner cannot admit, even notwithstanding the Authority of the *Learned Craig*; that heritable Offices or Jurisdictions are liable to be sold or appraised for Payments of Debts. It is a Position, for Proof of which, he mentions no Authority or Precedent; and for Authority and Proof of the contrary, and of the Argument humbly pleaded for the Petitioner, he must appeal to the Decision of this Court for him, formerly mentioned, and which is the only one that is in point to the present Question, before the Interlocutor, of which the Petitioner is now praying a Review, and that was the Case observed by Lord *Harcus*, decided the 2d of February 1682, *Bower of Kilmidrum* contra Earl *Marischal*, where, in a Process upon the passive Titles brought against the Earl for a Debt of his Predecessor, the passive Titles condescended on, were the Earl's using and exercising the Titles of Earl *Marischal*, "Upon which the Lords found "Peerages and Offices not to be *in commercio*; and therefore, "that the Defender's using the Title of Earl, and exercising "the Office of *Marischal*, made no passive Title." This Decision comes fully up to all that is contended for by the Petitioner in his present Action, *Dignities* and *Offices*, are here classed together, and considered in the same Light, and concerning both, 'tis found that they are not *in commercio*, that they cannot be bought and sold: From which, 'tis a necessary Consequence, that they are not liable to be adjudged for Payment of Debt. And, *lastly*, That the using of the Title of Earl, and exercising the Office of *Marischal*, made no passive Title, is a Proof, that the heritable Office could be taken up, and exercised without any Service, even as the Title of Earl could in the like Manner be assumed; and this is also what the Petitioner contends for, That without Service or Representation he is no less entitled to take and exercise the Office of heritable

heritable Usher, than to assume the Title of Baronet heritably conferred on his Ancestors ; or that, in his Case, as well as in the Earl *Marischal*, and all other heritable Offices, there is nothing more necessary than the Crown's actually admitting or receiving the apparent Heir of the Family into the Exercise of the Duty of the Office, for which no Grant in writing is needful, nor any previous Cognition by an Inquest, in order to the expediting of such Grant ; however, these Things may be necessary in the Infestment of a real Estate, that is properly patrimonial, and cannot be taken without incurring a passive Title.

But it has been objected for the Creditors of *Langton* That this heritable Office, in all the later Grants thereof above recited, has been annexed to, or incorporated with the Barony or Estate, and granted along with that to the Heirs and Assignies of the Vassal ; and therefore it is said, the Office must be transmissible to Purchasers, or Creditors, in the same manner as the Lands or Barony.

To this it is for the Petitioner humbly answered, That he denies the Consequence, and contends, that when two Subjects, so different in their Nature, as are a patrimonial Estate and an heritable Office, are united, or annexed together by Charter ; this can operate no further, than to make them pass by the same Titles, so long as both are retained by the Family ; but as one of these being the Estate which is truly patrimonial, is liable to be voluntarily sold, or to be evicted for Debts ; and the other being the Office, is, by its Nature, not capable of these Transmissions ; when the Estate comes to be alienated, there is necessarily an End of the Union : Because the Office cannot go along with it to singular Successors ; and the Union or Annexation proceeded from nothing but the fond Hope or Expectation of the Obtainers of such Charters, that the Estate itself was to remain for ever with their Family ; and that all their Privileges and Possessions that were heritable might be published and continued in the same Title-

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deeds, this Union was therefore obtained, which yet, by the Nature of the two Subjects, must be dissoluble, when the Estate, which is truly patrimonial, comes to be alienated or evicted.

This again cannot be better illustrated or proved, than by the Example of other *Dignities* or *Offices* annexed to Lands, of which there have been frequent Examples in this Kingdom: For Instance, it has been very common, even of later Times, since Lands became the Subject of Commerce and alienable, without Consent of the Superior, that the Nobility obtained their Lands to be erected into *Dukedoms*, *Earldoms* or *Lordships*; and yet it cannot be maintained, that this Erection will in the least affect the Transmission of the *Dignity*; that the Sale, Adjudication, or Apprising of the *Dukedom* will degrade the Duke or his Heirs; or that the Purchaser or Appriser of the Lands will become a Peer; the *Dignity* and Estate that are thus granted together, are in their Nature so very different, that they must continue distinct, and be governed by different Rules, any nominal Annexation notwithstanding.

In like manner, there are sundry Examples in our Records, wherein the Charters of noble Families, the *higher Offices* of which they were heritably possessed, are united and annexed to their Estates: For Instance, by Charter in the 1666, the *Title* and *Honour* of *Earl of Errol*, and the particular Lands and Baronies therein mentioned, with the Office of *Constabulary*, are granted to *Gilbert Earl of Errol*, his Heirs-male and of Tailie; whom failing, to his Heirs and Assigns whatsoever; and the King thereby unites, erects and incorporates the said *Title* and *Dignity*, the Office of *Constabulary*, and the Lands and Baronies into one haill and free *Earldom*. Now, this very Instance serves to shew, what could be the Operation of such Union or Annexation, and that, according to the Defender's Argument, it would prove a great deal too much; for here is both a *Title* of Honour and a *High Office* united and incorporated

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rated with an Estate; the last is no doubt liable to be sold and adjudged, and there is as little doubt the Purchaser or Adjudger could have no Right to the *Title* and *Dignity* of *Earl of Errol*; and there is the like Reason, that he could not take the *High Office* of *Constabulary*, tho' the *Title*, as well as the *Office* were nominally annexed to the Estate, and might all go alongst with it while the whole remained with the Family. But supposing a voluntary Sale, or an Eviction of the Estate, a Separation behoved necessarily to follow, that nominal or temporary Annexation notwithstanding, confessedly necessary in respect of the *Title* or *Dignity*, and for the like Reason necessary, in respect of the *High Office* of *Constabulary*, because that, as well as the other, was of its Nature *not patrimonial*, or liable by itself to be sold or adjudged; and if so, the Nature of it could not be altered, any more than that of the *Dignity*, by the Union or Annexation of both with the Estate, which necessarily behoved to be casual and temporary, that is, to take place only, so long as the whole should remain with the Family, or the Estate that was *patrimonial* and *alienable*, as well as the *Title* and *Office* that were not so.

The same Instance furnishes an Answer to the other Part of the Objection, namely, that the united Grant is made to *Heirs* and *Assignies*; for thus the *Title* and Honour of *Earl of Errol*, and the *Office* of *Constabulary*, as well as the Estate, are given by this Charter; but this must be understood *civiliter*, & *applicando singula singulis*, for as nothing can be understood to be given to *Assignies*, but the Estate, which was of its Nature alienable; and as it was impossible it could be meant or effected by this Charter, that the *Earl of Errol* had Power given him to sell his Peerage, the Nature of the thing forbidding such Alienation; for the same Reason it does not follow, that the Word *Assignies* could render the *Office* of *Constabulary* in that Case, or the *Office* of *Principal Usher* in the Case of the Family of *Langtoun*, alienable at Pleasure, in
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Virtue of the Mention of Assignies in a Charter of Lands, to which these Offices were respectively united.

Other Instances of the like Kind were formerly condescended on for the Petitioner, and the Argument is the same arising from them all; one of these was a Charter to the Duke of *Douglas*, of the 10th *March* 1702, granting to him, and his Heirs-male, and of Tailzie; whom failing, his Heirs and Assignies whatsoever, the Lands therein mentioned, and all the *Honours, Immunities, and Dignities* posselt and enjoyed by *Archibald* Earl of *Angus*, or any of his Predecessors, and specially the first Seat and Vote in Parliament, Conventions and Councils, and the first Place in Front of all Battles, and the Office of Crown-Bearer in all Parliaments; all united and incorporated into one intire and free *Earldom*, called *The Earldom of Angus*, by Charter, of Date the 6th *February* 1702. Now, tho' the Estate of this Noble Family may be sold or adjudged, and that possibly an Adjudger might not be fond to claim the first Place in the Front of Battles, yet neither would he be intitled to any of the other Honours and Dignities that are united and incorporated with the Estate, notwithstanding that in respect of the Estate the last Termination is to *Heirs and Assignies* whatsoever; from which it will not follow, that any of these *Honours* or *Dignities* could either be voluntarily sold by the Noble Person himself, or adjudged and posselt by any Creditor of his.

On the 12th *May* that same Year 1702, by a Charter from the Crown, there is granted to *John* Marquis of *Lorn*, his Heirs-male and of Tailzie; whom failing, to his *Heirs* and *Assignies* whatsoever the Lands therein mentioned, and the *hereditary Office* of Master of his Majesty's Household; and by the Charter, the Lands and Office are annexed and united to the Dukedom of *Argyle*; from which the same Reflections may be made as from the former Instance, to evince, that an Annexation of a Dignity or Office to Lands does not alter the Nature of the Dignity or Office; for that the Lands may be sold, appri-
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sed, or adjudged, in the same manner as before the Union or Erection, but as the Title of Honour, and the Office and other Privileges, by their Nature not alienable, must remain *extra commercium* as before, such Union or Annexation notwithstanding.

And further, to prove that the Addition of *Assignies* in Grants, containing Lands as well as Dignities, can have no Operation in respect of the latter; the Petitioner condescended on some Instances from the Records, where the like Addition is made in Grants of Honours together with Lands, where, from the Nature of the Thing, the Operation of the Word *Assignies* can only be understood to refer to the Lands, and could not possibly be meant to render the Titles of Honour alienable; one of these was a Charter in 1674. to *David Lord Madderty*, of the Title and Honour of Lord *Madderty*, and of the Lands therein mentioned, granting the same to him, his Heirs-male and of Tailzie; whom failing, his *Heirs and Assignies whatsoever*; and another was a Charter to *James Marquis of Montrose*, in September 1706, granting the Title and Honours of Marquis of *Montrose*, and the Lands therein mentioned in the like Terms; in none of which Cases it could be the Meaning or Operation of adding the Word *Assignies*, in a conjunct Grant of Lands and Honours, to render the latter alienable at the Pleasure of the Grantee; and therefore, from the Nature of the Thing, that Word can only be understood to refer to the real patrimonial Estate.

It was next objected for the Defenders, That there have been frequent Examples of heritable Sheriffships that have been bought and sold by private Transactions, and that there were two Examples of such Sheriffships being sold by judicial Sale before this Court, one of these in the Year 1685, as being Part of the Estate of *Urquhart of Cromarty*, that was purchased by the Viscount of *Tarbat*; and the other in the 1708, as Part of the Estate of *Bruce of Clackmannan*, that was purchased by Colonel *William Dalrymple*; from which it is inferred

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to be the Opinion of the Nation, and of this Court, that such Offices are *in commercio*, and adjudgeable.

It is answered, That a few Instances, if there are such, where Persons, possess of heritable Sheriffships, finding themselves straitned in their Circumstances, have taken upon them to dispose of that Office, the Petitioner apprehends can prove nothing, but that an Abuse is creeping in ; which affords an Argument for your Lordships examining with the greater Strictness and Severity, the Legality of such Practice, whenever the Question is brought and fairly debated before you ; and tho' the Office of heritable Sheriff be more common or frequent than that now in Question, whereof there is but one of the Kind. The Petitioner does not apprehend that the Office of heritable Sheriff is any more alienable than any other heritable Office, unless the Power of Deputation or Substitution, which is included in it, can be thought to afford a sufficient Reason of Difference ; but, in the Petitioner's Apprehension, as that Office implies the Power of a Judge as well as a Magistrate, it is no less incongruous and illegal that the same should be treated as a Subject *in commercio*, than in the Case of any other heritable Office ; and that any private Bargains or Practices that never have been challenged, or, upon Trial, found to be lawful and right, cannot serve to give Evidence how the Law stands in respect of this Question.

As for the two Instances of judicial Sales of Estates, in which the heritable Office of Sheriffship was comprehended, or thrown into the Bargain, as having belonged to the Bankrupt, being contained in his Charters, and accordingly adjudged with the rest by his Creditors, and brought to Sale *in cumulo*, as Part of the Estate, when no Objection was moved either by the Debtor himself, or any Body else. The Petitioner apprehends, that these two Instances can by no Means be constructed as implying any Judgment or Opinion of the Court of Session, that such heritable Offices were liable to be adjudged and sold for Payment of Debts ; for these may have easily past without
Notice

Notice or Observation of the Court, when thrown into the Adjudications and Summons of Sale, along with the Estate that truly belonged to the Bankrupt; especially as it has not been alledged that there was any Proof of the Value of these Offices, brought and advised as Part of the State of the Process of Sale, or any distinct Price set upon these by the Court. And tho' it might have been competent for the Court to have taken Notice of such improper Article, if it had been attended to or observed, the Omission or overlooking of such Objection is by no means equivalent to a Decision overruling it; and a Question that was never started cannot be said to have ever been decided. The judicial Sales, in these Cases, have, in all Probability, proceeded just as the Adjudications which preceeded them, that is, what was asked by the Pursuers was granted, so long as no Body on the Part of the Defender offered the least Objection. And as we find in the only Case where there was a Controversy or Debate on this Subject, being that of the Earl *Marischal* above mentioned, That the Court *in terminis*, found heritable Offices not to be *in commercio*, there seems to be little Reason to doubt, that if the like Objection had been stirred when such Offices were adjudged or brought to Sale, that the same Opinion would have been given by the Court, as in that only Instance that appears to have been litigated.

For as to the Preference granted in 1692 to Sir *James Cockburn*, upon his Disposition above-recited, of the Office now in Question for his Relief, in Competition with the other Creditors Adjudgers from *Langtoun*. It was, in effect, the same Case as in the two judicial Sales of Sheriffships, the only Parties appearing were all of one Side in the present Question, and agreed that the Office was alienable. There was no Compearance made for the common Debitor, or his Son, who had disposed this Office to Sir *James Cockburn* for his Relief, so that the present Question neither was nor could be stirred or decided in that Case; and besides, the whole Competition was determined by one Interlocutor of the Lord Ordinary in that

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Ranking ; and the Party preferred contented himself with what was the true Intent and Meaning of the Conveyance to him from his Debitor, namely, to uplift the Fees and Emoluments of the Office, without ever claiming or taking Possession of the Office itself; which uniformly was possess'd by *Langtoun* and his Heirs-male, in Terms of his Right.

And as for the other later Case that has been alledged, in which the Office of King's Printer was found by one Interlocutor to be adjudgeable ; however, the true Merits of that Question may stand, it is a Case widely different from the present, for the Import of the Grant is truly a *Monopoly* for a Term of Years of printing the Books in the Patent mentioned, which is expressly granted to the Patentee for himself, and his Partners, and Assignies ; the very Design of the Grant, is, That the same should be voluntarily communicated to others, and this being expressly in the Power of the Patentee, the Court was, it seems, of Opinion, that he might be compelled by Adjudication to communicate it to his own Creditors ; at the same Time, the Execution of that was found to be so difficult and inextricable, that it has never taken effect, nor, so far as the Petitioner can learn, was ever such Adjudication extracted.

The Defenders have further alledged, That from an Abstract of Retours and Charters taken from the Records, it appears, That when Offices were incorporated into Lordships and Baronies along with Lands, they have been frequently taken up by Retours of the Heirs in the Offices, as well as the Lands ; and from this Practice it is inferred, that Custom has required such Entry as necessary, in order to take up the Office, and consequently, That the Petitioner could not take the Office in Question, without being served, and representing.

But, with great Submission, the Consequence here drawn is by no means necessary ; for the Instances condescended on prove no more but this, that in these particular Cases, where the Predecessor had thought fit to get inserted in the same Charter

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or Infeftment the Land-eflate and heritable Office belonging to him, and where the Heir was willing to represent him, and to take the Land-eflate, in order to which an Entry by Service was neceffary to make up a Title to the Lands: The Heir finding the heritable Office mentioned in the fame Charter, ferves himfelf Heir in that, as well as in the Eftate; and the fame thing would naturally happen in the feveral Cafes, fome of which are above mentioned, where Titles of Honour, as well as Offices and Lands, are all comprehended in one Charter. But an hundred fuch Inftances, if there were fo many, could not prove the Neceffity of an Entry by Service, in order to take either a Title of Honour, or an heritable Office, being no more than the voluntary Acts of the Heir, when he is about to represent univerfally, being minded to take the Eftate; upon which his Writer throws into his Service whatever he finds in the Infeftment of his Predeceffor; and therefore, fuch Practice notwithstanding, it may ftill be true in point of Law, that was found in the Cafe of the Earl *Marifchal*, that Offices, as well as Titles of Honour, not being *in commercio*, may be taken up, ufed and exercifed, without incurring any paffive Title, or without Service to the Predeceffor; the apparent Heir, if he be minded to represent, even in refpect of Lands, may continue his Predeceffor's Poffeffion, tho' he cannot make a complete Title to the Lands without Infeftment, the Maxim of the Law being *nulla fafina, nulla terra*; but there is no Law that requires fuch Title, as neceffary for thefe incorporeal Rights of Dignities or Offices, the actual Exercife thereof by the Heir, admitted or accepted of by the Sovereign, is all the Entry that is neceffary to fuch Offices; and when the Land is evicted, as in the prefent Cafe, the apparent Heir has nothing to take, for which a Service is neceffary: And the Petitioner can obferve no Inftance of a Service ufed, where nothing was intended to be taken up but an Office or a Dignity. The Inftance of King *Charles II*'s Service, as Heir to the Duke of *Lenox*, was alledged for this Purpofe, as if that had

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been intended merely to take the Offices of High Admiral and Chamberlain, which were in the *Lenox-Family*. But this was not the Case in Fact, for the King was served Heir in the whole Earldom or Estate of *Lenox*, and these Offices went in to the Retour with the rest, as being contained in the Charter from which the Retour was taken or transcribed; and the Retour here, as in other Cases, was necessary for making up a Title to the Lands.

It cannot surely make any Alteration on the Merits of the present Question, That, by the later Charter 1674, there is a certain yearly Fee or Pension granted to this Office in lieu of the Livery and Maintenance allowed to the Usher, and his Attendants; for the original Constitution of the Office is to be considered, in order to determine its Nature, and that was an Office of Trust about the King's Person, not of the highest, nor yet of the lowest Kind, bestowed upon a Gentleman's Family of good Consideration; and, in Reality, rather an Office of Trust, and attended with some Dignity, than of any Profit or Advantage, the Livery or Maintenance was allowed towards indemnifying him of the Expence of his Attendance; and the Sallary lately granted in lieu of that, does not alter the Nature or Constitution of the Office it self, if it was not adjudgeable when there was no Profit to be got by it, it cannot become such, supposing the Emoluments to be encreased, or rather the Allowance or Indemnification of the Expence of Attendance; there are hardly any Offices but have some Emoluments, or Perquisites belonging to them, which are considered by the Law as the Wages earned by the Service performed, and are not even liable to be arrested by the private Creditors of the Officer.

It is hardly necessary to take Notice, That no Argument can be drawn to the present Question from the Jurisdictions of Barony or Regality, being liable to be adjudged along with the Lands, because these Jurisdictions are merely territorial; they are inherent Qualities or Privileges of the Estate it self, that go along with that to every Purchaser, they are not Offices

fices distinct from Property, but Privileges granted by the Crown over the Lands belonging in Property to the Grantee, and pass along with the Land it self to the Purchasers.

Since therefore the Grants, from the Crown, of Offices and Dignities, continue to this Day to be purely beneficiary, and are not naturally the Subject of Commerce, nor is it expedient for the Publick that Encouragement should be given for their becoming such; since, by the Rules of the Feudal Law, that continue in their original Force, in so far as concerns Offices and Dignities flowing from the Bounty of the Crown; these cannot be alienated by the Grantee, without the express Consent of the Crown, since Creditors cannot be supposed to have trusted their Money upon any Thing but the real *patrimonial Estate* that belonged to their Debitor; and it has been held, and found to be the Law of this Kingdom, that *Peerages* and *Offices* were not *in commercio*, and that an Heir's using the Office or Title that belonged to his Predecessor, made no passive Title, and that the contrary Decision now, would be, in effect, declaring all the highest old hereditary Offices to be *in commercio*, and liable to be evicted or possess'd by Adjudgers, or exposed to Sale to the highest Bidder, which appears to be both a new and a shocking Proposition, and yet a natural or necessary Consequence of the Interlocutor.

May it therefore please your Lordships, to alter your Interlocutor above-recited, finding the Office in Question adjudgeable; and to find, as in the Case of the Earl Marischal, That the Petitioner is entitled, as apparent Heir of the Family of Langtoun, to take and to hold this heritable Office of principal Usher to His Majesty, without incurring a passive Title, or being subjected to the Debts of his Predecessors.

According to Justice, &c.

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